SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

No. 71-5431

LARY VON ZAMFT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No.

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v.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the Decision and Judgment of the United States Court of Appeals for the Fifth Circuit entered on June 15, 1971.

THE OPINION BELOW

The United States Court of Appeals for the Fifth Circuit affirmed without an Opinion and the Per Curiam Opinion is printed in Appendix B *infra*, at p. 1 (b). It has not been reported.

JURISDICTION

The Court of Appeals filed its Opinion and Judgment on June 15, 1971 and denied petitioner's Petition for Rehearing on September 16, 1971. The Court of Appeals Order denying petitioner's Petition for Rehearing is printed in Appendix C *infra*, at p. 1 (c). The Court of Appeals stayed its Mandate until October 16, 1971. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 125-(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULE INVOLVED

Amendment V to the United States Constitution in its applicable part provides:

> "No person shall * * be deprived of his life, liberty or property, without due process of law; * * *."

Amendment VI to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

18 U.S.C., Sec. 2 provides:

> "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

18 U.S.C., Sec. 201 (c) provides:

> "(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:
>
> (1) being influenced in his performance of any official act; or
>
> (2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
>
> (3) being induced to do or omit to do any act in violation of his official duty;"

Rule 52(b) of the Federal Rules of Criminal Procedure provides:

> "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

STATEMENT OF THE CASE

Petitioner was charged in three Counts of an Indictment in the United States District Court for the Southern District of Florida with violating Title 18, U.S. Code, Section 2, of knowingly and willfully aiding and abetting Carolyn Copher[1] to commit an offense against the United States in violation of Title 18, U.S. Code, Section 201 (c). The indictment did not charge conspiracy. (T. 4-8).[2] A jury trial was held on June 3, 4 and 5, 1970. The jury found petitioner guilty as charged in Counts I and II and not guilty as charged in Count IV of the Indictment. (T. 357).

On September 3, 1970 petitioner was sentenced and committed to the custody of the Attorney General for four years

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[1]Hereinafter referred to as Copher.

[2]T. refers to the reporter's transcript of the proceedings.

on Count I and four years on Count II, the sentences imposed to run concurrently.

Petitioner was charged in paragraphs numbered 2 in Counts I, II and IV of the Indictment with violations of Title 18, U.S. Code, Section 2, by aiding and abetting Copher who was charged in paragraphs numbered 1 of Counts I, II and IV with violations of Title 18, U.S. Code, Section 201 (c). (T. 4-8).

Copher pleaded guilty only to Count I of the Indictment but no disposition was made of Counts II and IV of the Indictment prior to trial. Three persons were also involved as aiders and abettors, that is, the bribers of Copher who appeared as Government witnesses at the trial of petitioner.

Respondent called co-defendant Copher as its first witness who, over strenuous objections of petitioner, testified under threat of contempt by the Trial Judge that on April 15, 1970 she had entered a plea of guilty to Count I of the Indictment. (T. 28-31). The three bribers involved, namely, James Henry Meni[3] (Count I), Stephen Harris Brotman[4] (Count II), and Elliott Rogge[5] (Count IV), were called as Government witnesses. Over the strenuous objections of petitioner, these witnesses were permitted to testify to their conversations, negotiations and bribe arrangements with Copher. This testimony was hearsay because all of the conversations of these witnesses with Copher were held out of the presence of petitioner. Copher testified only that she entered a plea of guilty to Count I of the Indictment, was excused (T. 36) and did not testify to any of the alleged conversations, arrangements and bribes involving petitioner, as described by the bribers.

Petitioner contended unsuccessfully in the courts below that the testimony of Copher, admitting or confessing to a plea of guilty only to Count I of the Indictment (she did

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[3]Hereinafter referred to as Meni.

[4]Hereinafter referred to as Brotman.

[5]Hereinafter referred to as Rogge.

not testify to the factual basis for the entry of this plea) was inadmissible and highly prejudicial, particularly as Copher was a defendant in Counts II and IV involving the same allegations and charges with reference to Copher and petitioner except that they involved different persons, dates and different sums of money. The prosecution did not reveal through Copher any arrangements made with her for the disposition of the remaining Counts of the Indictment against her and other Counts not involving petitioner, four in all, at the trial. We will discuss later what the situation actually was and the disposition of these Counts, none of which was brought to the attention of the jury by the prosecution, contrary to the Canons of legal ethics. The putting in evidence of the prejudicial conversations and bribe arrangements made between Copher and the three Government witnesses, Meni, Brotman and Rogge, all of which admittedly were made out of the presence of petitioner, permitted the rankest kind of highly prejudicial hearsay evidence to be the basis for petitioner's conviction. The three Government witnesses were accomplices of petitioner as a matter of law under the facts adduced. They all were seeking to obtain draft deferments by bribing Copher. The Trial Court at the very least was required to give cautionary instructions with regard to the weight to be given the testimony of these admitted accomplices, but the Trial Court refused to give such an instruction as specifically requested by petitioner. Further prejudice resulted to petitioner because the effect of admitting Copher's confession or plea of guilty under Count I necessarily carried over and affected the jury's deliberations concerning Counts II and IV, to petitioner's prejudice.

Copher, a co-defendant, who was not on trial but who was indicted along with petitioner, was charged in all three Counts of the Indictment with violations of Title 18, U.S. Code, Section 201 (c). (T. 4-8). Copher was charged in Counts I, II and IV with "being an officer and employee of the United States, acting for and on behalf thereof in an official function, under and by authority of the Selective

Service System, as executive secretary of Local Board 169, did directly and indirectly corruptly ask, demand, exact, solicit, seek and agree to receive a thing of value, to-wit" * * * "in return for being influenced to commit and to aid in committing, and to collude in and allow a fraud and to make opportunity for the commission of a fraud on the United States, and in return for being influenced to do and to omit to do an act in violation of her official duties by permitting" * * * "a deferment from military service; in violation of the laws of the United States and in violation of Title 18, United States Code, Section 201 (c)." (T. 4-8).

The only differences between Counts I, II and IV were the sums involved and the names of the individuals who allegedly received deferments from military service by bribing Copher.

Petitioner strenuously objected to Copher testifying and confessing to a plea of guilty under Count I. (T. 26-29, 32).

Copher testified as she had been threatened by the Trial Judge with contempt that she had entered a plea of guilty to Count I. Not only was this testimony prejudicial, but it also prejudiced petitioner in regard to Counts II and IV. The Indictment contained the only direct evidence that Copher was an officer and employee of the United States acting for and on behalf thereof in an official function under and by authority of the Selective Service System as executive secretary of Local Board 169. Proof of these facts was essential to the prosecution's case but no competent evidence was received concerning these facts. Copher did not testify to her employment and her duties on the dates involved, nor did any other witness for the prosecution testify directly to the nature of employment, her duties, and to the dates of this employment in order to tie that employment into the dates covered by Counts I, II and IV of the Indictment. The confession of guilt under Count I by Copher was submitted to the jury along with the Indictment. Therefore, the jury could certainly infer that this established the employment and the duties of Copher also under Counts

II and IV involving different persons and different dates. The prejudicial effect of Copher's admission of guilt was compounded by the Trial Court because the court did not instruct the jury that Copher's admission of guilt under Count I was not to be considered by the jury as evidence of guilt of petitioner. (T. 330-340). No such instruction was given when the evidence was received nor was it covered in the court's final instructions to the jury. (T. 330-340). The prejudical nature of Copher's confession and admission of guilt to Count I is shown by the hearsay testimony of the three prosecution witnesses, Meni, Brotman and Rogge, who testified concerning the charges under Counts I, II and IV. All three witnesses testified that they had contacted Copher and were referred to petitioner by Copher.

James Henry Meni testified for the Government as to Count I:

> "Meni: * * * I spoke to Mrs. Copher." (T. 45).
>
> "Q. (by Government) Did she offer an alternative to this?" (T. 55).
>
> (Meni) "A. Yes. One of the names she mentioned was Lary Von Zamft." (T. 55).
>
> "Q. What did she say concerning him?"
>
> "A. She asked me if I knew him and I said no. When she first mentioned his name, I thought—"
>
> "Mr. Guilmartin: For my record, I want to protest and object to the question and move to strike the answer as thus far reported on the ground that it is hearsay; that it is in the absence and not in the presence of this defendant; that it precludes us from an opportunity to defend or rebut the same and on the general ground that it is hearsay."
>
> "The Court: All right, sir. Your objection is overruled."
>
> "By Mr. Martinez:
>
> "Q. Please continue, sir."
>
> "A. She said that 'I graduated from Miami Beach High School in 1962,' and she said that 'Lary was

in school with me at that time,' and she asked me, she said, 'Maybe you know him as, I think, Spider?' She said he had a nickname of 'Spider" or 'Spike," I think she mentioned. I said, 'No, I don't know of a person by that name.'

"She says, 'Well, he graduated maybe a year before you,' and I still didn't know him. It is possible that I may have seen Lary at school, but I have never known him, like passing in the hall or something and seeing somebody. But if I saw him before, it was that time."

"Q. What did she say concerning him?

"A. She said that Lary knows someone; that Lary might be able to help me. So, under the circumstances, I thought that was my only chance because–"

"Q. What did you do after she said this?"

"A. I asked her if she could arrange–if I could meet Lary and we could talk. And she said yes. And she said that–she asked me to call her back in the afternoon, like around two o'clock, at which time I did. And she arranged a meeting in a place for us for that night. It was seven or eight o'clock at night. * * 8" (T. 55-57).

Stephen Harris Brotman testified for the Government as to Count II:

"Q. (Government) Who did you ask, sir?"

"A. (Brotman). Well, I went to the only liaison between the draft board and myself, which would be the clerk of my local draft board."

"Q. Sir, did you know the name of the person that you talked to at that time?"

"A. I did. It was Carolyn Copher who was clerk of the draft board, Local Board 169." (T. 134).

"Q. (Government) Sir, did you have any further discussion with her?"

"A. Well, at that time she sort of shocked me, and I thought that the hernia was a pretty clearcut deferment on a physical basis. And she said, 'Well, it wouldn't get you out.' "

"And sort of thinking out loud I said, 'What am I going to do now?" "

"And at that time she said, 'Well, I know a fellow who might be able to help you.' "

"And I asked here, 'Who is it?' You know, anybody who could help me, I'll try it."

"And she said, 'Well, I don't remember his name right offhand. Let me look it up in the files. I have a notation of it,' or some words to that effect. 'And call me back later.' "

"And later that day I called her back and she said 'There is a fellow by the name of Lary Von Zamft,' or she pronounced a name similar to that–Von Zamft–' and he's pretty good at this sort of thing. He might be able to help you out.' or words to that effect. And she said, 'Contact him. Maybe he can do something for you.'

"Q. And did you recognize this name?"

"A. Yes, I did. I had gone to school with Mr. Von Zamft and we had been neighbors for a period of a year." (T. 139-140).

Elliott Rogge testified for the Government as to Count IV:

"Q. (Government) Did you have occasion to meet someone by the name of Carolyn Copher about that time?"

"A. (Rogge) Not about that time; later on." (T. 204).

"Q. What conversation did you have with her on these telephone conversations?"

"A. She told me that she could put me in touch with someone who could arrange for me to get a deferment." (T. 212).

Because of this hearsay testimony the prejudicial nature of Copher's confession or admission of guilt as to Count I is plain. Each of the three Government witnesses testified to conversations with Copher referring to petitioner out of petitioner's presence. Not only were these conversations hearsay, prejudicial and not admissible against petitioner, but the admission of guilt by Copher under Count I undoubtedly carried over and affected the jury's deliberations concerning the charge against petitioner in Count II.

In the cross-examination of the three prosecution witnesses, evidence which the prosecution had not revealed was adduced. This established that the Government witnesses had been collaborating with the prosecution and had appeared before the Grand Jury, two had first taken the position that they would not testify because their evidence would incriminate them, and then the prosecutor arranged to take the witnesses before the Trial Court and have the Trial Court grant these prosecution witnesses immunity from prosecution for their criminal acts. (Rogge - T. 232-237; Brotman - T. 177-182). The third witness had the understanding with the prosecution if he testified against Copher and petitioner he would not be prosecuted. (Meni - T. 107-111). Concerning Copher, when the prosecution took her plea of guilty under Count I, it did not dismiss the remaining four criminal charges against her but held these charges undisposed of until after she admitted in the trial of petitioner that she had pleaded guilty under Count I.

It is now a matter of public knowledge that Copher cooperated with the prosecution because both the F.B.I. and the prosecutor indicated that if she cooperated and pleaded guilty to one charge, the others would be dropped, that she was led to believe that she would receive lenient treatment and under these arrangements expected probation. These facts are reported in the Miami Herald, Saturday, July 18, 1970. The article, "Draft Board Aide Tells Of Bribe Offers", is printed in the Appendix E at page 1 (e). None of these facts were made known by the prosecution to the court and jury

at the trial of petitioner. The suppression of these facts prejudiced petitioner and contributed to deprive him of a fair trial.

Petitioner, in an effort to protect his rights and to secure a fair trial, moved to strike Copher's testimony regarding her plea of guilty to Count I and for a mistrial, but this motion was denied. (T. 32).

Other circumstances at the trial prejudiced petitioner and deprived him of a fair trial. Throughout the trial petitioner was required to ask for Jencks statements, but these statements were all withheld until the witnesses had completed their testimony and then tendered to the petitioner in the presence of the jury by the prosecutor. Concerning the witness Rogge, when it was developed on cross-examination that he had appeared before the Grand Jury on a second occasion and had answered questions concerning the facts, a copy of his Grand Jury transcript was demanded, was refused by the prosecutor and the court refused to order its production, all contrary to *Jencks v. United States*, 353 U.S. 57, 77 S. Ct. 1007 (1957). (T. 236).

In the jury's presence the Trial Court, in overruling the objections of petitioner to Brotman's hearsay testimony and in denying petitioner's motion to strike that hearsay testimony, did so in a highly prejudicial manner and cited five cases which the Judge stated were the authorities for his actions. (T. 136). When petitioner endeavored, during the cross-examination of Brotman, to establish financial motives for his actions in bribing Copher, which go to the creditability and weight to be given Brotman's testimony, the Trial Court erroneously overruled this line of inquiry into motives as irrelevant. (T. 192-194). During the cross-examination of the witness Brotman, the Trial Court on several occasions helped the witness and supplied answers for the witness, to petitioner's prejudice. (T. 185, 196, 197). A rule was placed at petitioner's request on all witnesses requiring such witnesses not to be present during the proceedings or the taking of any testimony. Notwithstanding this rule, the Trial Court permitted a Federal agent who had

been assisting the Government throughout the trial –one Ackerley– to take the stand and testify against petitioner in an effort to corroborate other testimony concerning a vehicle allegedly owned by petitioner. (T. 248). The complicated regulations of the Draft Board were not proved by production of the regulations but were described by the hearsay testimony of prosecution witness Lambrecht over petitioner's objections. (T. 262-266). The Trial Court in critical areas assisted the prosecution by examining prosecution witness Lambrecht. (T. 267-269). Petitioner's efforts to cross-examine Lambrecht in an effort to show that there were a number of omissions and errors in the draft board records regarding requirements for the issuance of draft cards and that there was nothing to show that the witness Brotman should not be deferred, were erroneously cut off by the Trial Court as "irrelevant." (T. 281-282).

At the conclusion of the Government's evidence, petitioner moved for a judgment of acquittal and dismissal of the Indictment on the grounds that the Government had failed to establish the essential facts in the Indictment under its burden of proving all of those facts by competent evidence beyond a reasonable doubt. The Trial Court erroneously denied this motion. (T. 293-294).

Petitioner did not testify in his own defense but planned to call fifteen character witnesses in his defense. The Trial Court erroneously restricted the character witnesses to two short witnesses and rejected properly proffered character testimony to petitioner's prejudice. (T. 294, 305-318). After the two character witnesses testified, petitioner rested. (T. 335).

The prosecution put on no rebuttal testimony. (T. 335). Petitioner renewed his motion for a judgment of acquittal and dismissal of the Indictment. (T. 336). The Trial Court erroneously denied this motion. (T. 340). In the Trial Court's instructions to the jury, the court did not charge the jury concerning the testimony of the prosecution witnesses, Copher, Meni, Brotman and Rogge, that they were accomplices and their testimony should be received with

caution. Petitioner objected to the charge in regard to the testimony of these accomplices and requested that the instruction contained in Section 9.04 of Mathis and Devitt, Chapter 9, page 113, be given. The Trial Court refused the requested instruction. Petitioner also objected to the manner in which that court charged regarding the elements of the offenses described in the Indictment, because the charge failed to state that the burden was always upon the prosecution to prove beyond a reasonable doubt every essential element of the crimes charged. Petitioner's objections to the charge were overruled and the charge was not amended in any way. (T. 352-354).

The jury found petitioner guilty on Counts I and II and not guilty on Count IV. (T. 356-357).

Petitioner duly appealed to the court below. The points urged here were urged on that court. In the court below respondent principally relied upon *Delli Paoli v. U.S.*, 352 U.S. 232, (Br. 12) notwithstanding that this Court had reversed *Paoli* in *Bruton v. United States*, 391 U.S. 124 (1968). This was pointed out to the court below, but that court has *refused* to follow this Court's ruling in *Bruton* and the cases following it, affirmed without Opinion and denied also without Opinion petitioner's Petition for Rehearing. This may explain the failure of the court below to render any opinion in this case.

Petitioner is at large on bail on his personal recognizance. (T. 359-359A).

QUESTIONS PRESENTED

1. Whether petitioner was deprived of his constitutional rights to a fair trial and is being deprived of his liberty without due process of law, contrary to the Fifth and Sixth Amendments to the Constitution of the United States in a criminal case where the District Court permitted such a great number of plain prejudicial errors (including but not limited to the following) as to completely invalidate the trial proceedings, to-wit:

(a) Permitting co-defendant Copher to confess her guilt by testifying under threat of contempt that she had pleaded guilty to Count I of the Complaint.

(b) Permitting the prosecution witnesses who were accomplices and alleged bribers of Copher to testify to prejudicial hearsay conversations with Copher, implicating petitioner, all of which conversations admittedly occurred out of the presence of petitioner.

(c) Overruling petitioner's objections in a prejudicial manner, restricting proper cross-examination, suggesting answers to prosecution witnesses, permitting a Federal agent to testify contrary to the rule against witnesses imposed at the beginning of the trial, assisting the prosecution by examining prosecution witness Lambrecht in critical areas, in refusing to require the production of the Grand Jury testimony, in admitting other hearsay testimony and in refusing to instruct the jury as requested by petitioner.

2. Whether the Trial Court erred in denying petitioner's motions for a directed verdict and judgment of acquittal made at the conclusion of the prosecution's evidence and at the conclusion of all of the evidence.

3. Whether the Trial Court erred in denying petitioner's motions for a mistrial.

REASONS FOR GRANTING THE WRIT

Several of the reasons governing review on Certiorari by this Court are present in this case. The court below has rendered a decision in conflict with the decisions of this Court, other Circuit Courts of Appeals, and with authortative decisions in the State Courts, and, in erroneously affirming actions of the District Court deprived petitioner of a fair and impartial trial and of the right not to be deprived of his liberty without due process of law, contrary to Amendments V and VI to the Constitution of the United States.

The decisions below have so far departed from the accepted and usual course of judicial proceedings, and the

Court of Appeals has sanctioned such a departure by the District Court as to call for an exercise of this Court's power of supervision.

I

PETITIONER IS BEING DEPRIVED OF HIS LIBERTY WITHOUT DUE PROCESS OF LAW BECAUSE OF PLAIN PREJUDICIAL ERRORS COMMITTED IN THE DISTRICT COURT

Petitioner was the only one of the four persons involved in the alleged transactions described in Counts I, II and III of the Indictment who was required to stand trial. At best under the prosecution's theory he was a mere go between. The prosecution witnesses Meni, Brotman and Rogge all approached Copher for the purpose of bribing her to issue them draft cards in order that they would not be inducted into the military service of the United States. All the prosecution witnesses made deals with the F.B.I. and the prosecution under which they would not be prosecuted, tried and, in regard to Copher, four other criminal charge would be dropped and efforts would be made to obtain her probation. Against this background the prosecution adopted the following plan of trial, which was erroneously permitted to be carried out by the Trial Court. This plan deprived petitioner of his constitutional rights to a fair and impartial trial and the right of confrontation and cross-examination in critical factual areas connecting petitioner with the crimes charged in the Indictment. The prosecution first, after making its deal with Copher, placed her on the stand, after she had pleaded guilty only to Count I, and sought to have her testify and confess her guilt by admitting in the presence of the jury that she had pleaded guilty to Count I. Her efforts to rely on the Fifth Amendment were overruled by the Trial Judge, who ordered her to testify as to her plea of guilty before the jury under the threat of holding her in contempt if she

did not do so. This was the only testimony adduced by the prosecution from the witness Copher, the alleged employee of the Selective Service System, and she was thereupon excused.

After Copher was excused, the prosecution then called as witnesses the three alleged bribers who allegedly obtained through Copher for money payments draft exemption cards which kept these witnesses from being inducted into the military service. The prosecution did not bring out on direct examination, under arrangements made with the F.B.I. and the prosecution, that two of the witnesses had obtained immunity from prosecution if they testified against petitioner, and that the third would not be prosecuted if he likewise testified against petitioner.

Prosecution witnesses Meni, Brotman and Rogge, over the strenuous objections of petitioner, *were permitted to testify to their conversations, negotiations and arrangements made out of the presence of petitioner with Copher.* These hearsay conversations supplied the necessary links connecting petitioner as an alleged go between in these bribery negotiations. The use of this prejudicial hearsay testimony establishing the conversations which Copher had with each of these prosecution witnesses, which was the rankest hearsay, precluded petitioner from cross-examining Copher and of his rights of confrontation involving her, because she did not testify in these critical errors and had been excused.

Respondent, in the proceedings below, to support the receipt in evidence of the confession of Copher and of the hearsay statements of prosecution witnesses Meni, Brotman and Rogge, relied principally on "*Delli Paoli v. U.S.*, 352 U.S. 232." (Br., 12). Notwithstanding that petitioner in his Reply Brief in the court below pointed out that *Paoli* had been reversed by this Court in *Bruton v. United States,* 391 U.S. 123, 88 S. Ct. 1620 (1968), the court below refused to follow *Bruton* and affirmed without Opinion.

In *Bruton*, Bruton had been convicted by a jury. In the trial a postal inspector testified that Evans, a co-defendant, had confessed that Evans and Bruton committed the armed robbery charged in the Indictment. This conversation, (like the conversations of Copher, a co-defendant, which were testified to by Meni, Brotman and Rogge) had been received in evidence on the authority of *Delli Paoli v. U.S.*, 352 U.S. 232, 77 S. Ct. 294, where a conviction had been affirmed because the jury had been instructed that a co-defendant's confession inculpating another defendant had to be disregarded in determining his guilt or innocence. (pp. 124, 1621-1622).

We submit that the actions of the courts below in admitting against petitioner the confession of Copher and the hearsay statements concerning the details of the conversations between Copher and the witnesses, Meni, Brotman and Rogge, implicating petitioner, involve flat refusals by those courts to follow *Bruton*. The reasoning of the courts below that the confession of guilt under Count I of Copher was admissible against petitioner is erroneous and those courts' actions in admitting the prejudicial hearsay testimony against petitioner deprived him of a fair trial. The receipt of the statements, particularly of Copher, compounded the error because Copher was not on trial, hence there was no occasion to adduce from Copher the confession that she had pleaded guilty to Count I in a trial involving only petitioner. This is plain from *Bruton*, which holds that the statement of another co-defendant inculpating petitioner as "clearly inadmissible." Thus, *Bruton* in footnote 3 , pp. 127, 623, states:

> "We emphasize that the hearsay statement inculpating petitioner was clearly inadmissible against him under traditional rules of evidence, see *Krulewitch v. United States*, 336 U.S. 440, 69 S. Ct. 716, 93 L. Ed. 790; *Fiswick v. United States*, 329 U.S. 211, 67 S. Ct. 224, 91 L. Ed. 196, the problem arising only because the statement

> was (but for the violation of *Westover, supra*, n. 1) admissible against the declarant Evans. * * * ."

In *Bruton*, Bruton was tried jointly with one Evans for armed postal robbery. Evans' confession of guilt was admitted against him and was testified to by a postal inspector. The District Court and the Court of Appeals in *Bruton* refused to set aside Bruton's conviction because the District Court had instructed the jury that Evans' confession was competent evidence against Evans only and was inadmissible hearsay against Bruton, which the jury had to disregard in determining Bruton's guilt or innocence. (pp. 125, 1622). The courts in *Bruton* like the courts below had relied on *Paoli* for these actions. (pp. 125, 1622). While the Solicitor General sought to have the case returned for a new trial without Opinion, this Court granted Certiorari to reconsider *Paoli*. (pp. 125, 1622).

That the courts below committed plain error in following *Paoli* is clear from the holding of this Court in *Bruton* (pp. 124-126, 1621-1622):

> "However, the court, relying upon *Delli Paoli*, affirmed petitioner's conviction because the trial judge instructed the jury that although Evans' confession was competent evidence against Evans it was inadmissible hearsay against petitioner and therefore had to be disregarded in determining petitioner's guilt or innocence. 375 F. 2d, at 361-363. We granted certiorari to reconsider *Delli Paoli*. 389 U.S. 818, 88 S. Ct. 126, 19 L. Ed. 2d 70. The Solicitor General has since submitted a memorandum stating that 'in the light of the record in this particular case and in the interests of justice, the judgment below should be reversed and the cause remanded for a new trial.' The Solicitor General states that this disposition is urged in part because '(h)ere it has been determined that the confession was wrongly admitted against (Evans) and his conviction has been reversed, leading to a new trial at which he was acquit-

> ted. To argue, in this situation, that (Petitioners') conviction should nevertheless stand may be to place too great a strain upon the *(Delli Paoli)* rule—at least, where, as here the other evidence against (petitioner) is not strong.' We have concluded, however, that *Delli Paoli* should be overruled. We hold that, because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admissions of Evans' confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment. We therefore overrule *Delli Paoli* and reverse."

Moreover, this Court pointed out in *Bruton* that *Paoli* had been effectively repudiated in *Pointer v. State of Texas*, 380 U.S. 400, 85 S. Ct. 1065 (1959) wherein it was held (pp. 404, 1068):

> "* * * that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him."

Continuing, this Court said that the right is secured by the Sixth Amendment, and further held (pp. 406-407, 1069):

> "* * * a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him."

This Court cited as another reason for reversing *Paoli* in *Bruton, Douglas v. State of Alabama*, 380 U.S. 415, 85 S. Ct. 1074 (1959) and stated (pp. 126-127, 1623):

> "We applied *Pointer* in Douglas v. State of Alabama, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934, in circumstances analogous to those in the present case. There two persons, Loyd and Douglas, accused of assault with intent to murder, were tried separately. Loyd was tried first and found guilty. At Douglas' trial the State called Loyd as

> a witness against him. An appeal was pending from Loyd's conviction and Loyd invoked the privilege against self-incrimination and refused to answer any questions. The prosecution was permitted to treat Loyd as a hostile witness. Under the guise of refreshing Loyd's recollection the prosecutor questioned Loyd by asking him to confirm or deny statements read by the prosecutor from a document purported to be Loyd's confession. These statements inculpated Douglas in the crime. We held that Douglas' inability to cross-examine Loyd denied Douglas 'the right of cross-examination secured by the Confrontation Clause.' 380 U.S. at 419, 85 S. Ct. at 1077. We noted that 'effective confrontation of Loyd was possible only if Loyd affirmed the statement as his. However, Loyd did not do so, but relied on his privilege to refuse to asnwer."
>
> * * * * *
>
> Here Evans' oral confessions were in fact testified to, and were therefore actually in evidence. That testimony was legitimate evidence against Evans and to that extent was properly before the jury during its deliberations. Even greater, then, was the likelihood that the jury would believe Evans made the statements and that they were true—not just the self-incriminating portions but those implicating petitioner as well. Plainly, the introduction of Evans' confession added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination, since Evans did not take the stand. Petitioner thus was denied his constitutional right of confrontation."

Prior to *Bruton, Paoli* and cases following it assumed that the right of confrontation could be avoided by instructions to the jury to disregard the inadmissible hearsay testimony where it concerned another defendant. (pp. 128, 1623). In repudiating *Paoli* and similar cases, in this regard, this Court held (pp. 128-129, 1622-1624, 1625):

"*Delli Paoli* assumed that this encroachment on the right to confrontation could be avoided by the instruction to the jury to disregard the inadmissible hearsay evidence. But, as we have said, that assumption has since been effectively repudiated."

* * * * *

"Significantly, we supported that conclusion in part by reliance upon the dissenting opinion of Mr. Justice Frankfurter for the four Justices who dissented in *Delli Paoli.* Id., at 388, n. 15, 84 S. Ct., at 1787.

That dissent challenged the basic premise of *Delli Paoli* that a properly instructed jury would ignore the confessor's inculpation of the nonconfessor in determining the latter's guilt. 'The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against who such a declaration should not tell."

* * * * *

"In addition to *Jackson,* our action in 1966 in amending Rule 14 of the Federal Rules of Criminal procedure also evidences our repudiation of *Delli Paoli's* basic premise. Rule 14 authorizes a severance where it appears that a defendant might be prejudiced by a joint trial."

The prejudice to petitioner was compounded because the Trial Court erred in not giving the requested cautionary instructions that Copher's admission of guilt applied only to her, and her confession could not be used by the jury to implicate petitioner, and her testimony, together with the testimony of the other accomplices, should be received with caution and weighed with great care. Petitioner sought at the very least an instruction in the con-

text of Mathes and Devitt, Federal Jury Instructions, Section 9.04, which reads:

> "An accomplice is one who united with another person in the commission of a crime, voluntarily and with common intent. An accomplice does not become incompetent as a witness because of participation in the crime charged. On the contrary, the testimony of an accomplice alone, if believed by the jury, may be of sufficient weight to sustain a verdict of guilty, even though not corroborated or supported by other evidence. However, the jury should keep in mind that such testimony is always to be received with caution and weighed with great care.
>
> You should never convict a defendant upon the unsupported testimony of an accomplice, unless you believe the unsupported testimony beyond a reasonable doubt."

The failure to give proper limiting instructions is plain error requiring reversal. This Court in *Bruton,* in rejecting the theory that instructions to juries can cure prejudicial errors, held (pp. 137, 1628):

> "Here the introduction of Evans' confession posed a substantial threat to petitioner's right to confront the witnesses against him, and this is a hazard we cannot ignore. Despite the concededly clear instructions to the jury to disregard Evans' inadmissible hearsay evidence inculpating petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination. The effect is the same as if there had been no instruction at all. See Anderson v. United States, 318 U.S. 350, 356-357, 63 S. Ct. 599, 602, 87 L. Ed. 829; cf. Burgett v. State of Texas, 389 U.S. 109, 115, 88 S. Ct. 258, 262, 19 L. Ed. 2d 319."

The actions of the courts below in refusing to follow *Bruton* and the numerous cases decided under *Bruton*

means that in the Fifth Circuit *Bruton* is being ignored and this permits such a departure from the accepted and usual course of judicial proceedings in criminal cases as to call for the exercise of this Court's power of supervision.[6]

Where, on Petitions for Certiorari, it has been pointed out to this Court that *Bruton* has not been followed, in both Federal and State Courts, this Court has granted Certiorari, reversed and remanded for further proceedings in accordance with *Bruton*.

Harrison v. United States, 392 U.S. 219, 88 S. Ct. 2008 (1968);
Ashe v. Swenson, 397 U.S. 436, 90 S. Ct. 1189 (1970);
California v. Green, 399 U.S. 152, 90 S. Ct. 1930 (1970);
Jones v. Florida, 394 U.S. 720, 89 S. Ct. 1473 (1969);
Stanbridge v. New York, 395 U.S. 709, 89 S. Ct. 2033 (1969).

When we eliminate from the record the confession of Copher and the hearsay statements attributed to Copher by the witnesses, Meni, Brotman and Rogge, coupled with the failure of the prosecution to prove the employment with the Draft Board of Copher during the dates described in the Indictment, there was insufficient competent evi-

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[6]The Fifth Circuit stands alone in refusing to follow *Bruton*, and its actions conflict with numerous cases decided by this Court, by other Federal Courts and by authorative State Courts which have cited *Bruton* and either distinguished it or followed it. Shepard's U.S. Citations, Case Editions, through 1971, reveal that *Bruton* has been cited 693 times. It has been cited and distinguished or followed in 214 U.S. decisions. It has been similarly cited in 408 State Court decisions, as follows: (Cases cited by 38 state courts): Alaska 1; Arizona 19; Arkansas 2; California 71; Connecticut 6; Florida 16; Georgia 8; Hawaii 2; Illinois 34; Indiana 1; Iowa 1; Kansas 2; Kentucky 2; Louisiana 13; Maryland 27; Massachusetts 17; Michigan 37; Minnesota 2; Missouri 1; Nebraska 2; Neveda 2; New Hampshire 1; New Jersey 12; New Mexico 4; New York 71; North Carolina 7; Ohio 3; Oklahoma 1; Oregon 1; Pennsylvania 14; South Carolina 2; South Dakota 1; Tennessee 7; Texas 10; Utah 1; Washington 3 and Wisconsin 4.

dence in this record to support a verdict of guilty. Therefore, petitioner's motions for a directed verdict and judgment of acquittal made at the conclusion of the prosecution's case and at the conclusion of all of the evidence should have been granted.

II

OTHER ERRONEOUS ACTIONS OF THE TRIAL COURT AFFIRMED BELOW CONTRIBUTED TO AND DEPRIVED PETITIONER OF A FAIR TRIAL

The permitting of Copher to confess her guilt under duress and the placing before the jury hearsay conversations with Copher by prosecution witnesses, Meni, Brotman and Rogge, prejudiced petitioner and deprived him of a fair trial. In this regard petitioner's motions for a mistrial should have been granted.

The prejudice to petitioner, because of the manner in which the trial was conducted below, was compounded by other actions of the Trial Court. As we have pointed out in our Statement of the Case that court overruled petitioner's objections in a prejudicial manner, citing cases in support of its rulings in the presence of the jury, suggested answers to proseuction witnesses, permitted a Federal agent to testify contrary to the Rule, examined prosecution witness Lambrecht in critical areas, refused to require the production of the Grand Jury testimony of the witness Rogge (contrary to *Jencks v. United States,* 353 U.S. 657, 77 S. Ct. 1007 (1957)), permitted other hearsay evidence regarding the rules and regulations of the Draft Board involved and refused proper instructions requested by petitioner.

Similar actions have been condemned because they deprive the accused of a fair and impartial trial and necessitate reversal.

Peckham v. United States, 96 U.S. App. D.C. 212, 226 F. 2d 34, Cert. Den. 350 U.S. 912, 76 S. Ct. 195 (1953).

Moreover, the Trial Court erroneously restricted the character witnesses to be called in petitioner's defense to two

"short witnesses." In keeping with this prejudicial ruling, the court refused admissible character testimony proffered on behalf of petitioner. The rejection of this evidence denied petitioner a full and fair means of defending himself, justifying reversal.

McCandless v. United States, 298 U.S. 342, 346, 56 S. Ct. 764, 766 (1936).

Offutt v. United States, 232 F. 2d 69, Cert. Den. 351 U.S. 988, 76 S. Ct. 1049, Reh. Den. 352 U.S. 860, 77 S. Ct. 25 (1956).

Again we submit that the proceedings below involved prejudical departures from the accepted and usual course of judicial proceedings in criminal cases in the Federal Courts as to require the exercise of this Court's powers of supervision and correction.

CONCLUSION

The important questions involved showing petitioner was deprived of a fair trial and is being deprived of his liberty without due process of law should be reviewed and decided by this Court to further the proper administration of justice in criminal cases, particularly in the Fifth Circuit in the public interest. For the reasons and grounds stated in this Petition, the erroneous decision below should be reversed and it is prayed that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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Counsel for Petitioner

Of Counsel:

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October 15, 1971

APPENDIX A

UNITED STATES COURT OF APPEALS

For The Fifth Circuit

October Term, 1970

No. 30535

D.C. Docket No.
69-517-CR-WM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,
versus

LARY VON ZAMFT,

Defendant-Appellant.

Appeal from the United States District Court
for the
Southern District of Florida

Before COLEMAN, GOLDBERG and DYER,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

June 15, 1971

Issued as Mandate:

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 30535

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LARY VON ZAMFT,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

---

(June 15, 1971)

Before COLEMAN, GOLDBERG, and DYER, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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[1]See NLRB v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

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APPENDIX C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 30535

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LARY VON ZAMFT,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion June 15, 1971, 5 Cir., 1971, ____ F.2d ____).

(September 16, 1971)

Before COLEMAN, GOLDBERG and DYER, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX D

UNITED STATES COURT OF APPEALS

Fifth Circuit

OFFICE OF THE CLERK

Edward W. Wadsworth

Clerk

Room 408-400
Royal St.
New Orleans,
La. 70130

October 5, 1971

Mr. Harold Ungerleider
Attorney at Law
1400 N.W. 10th Avenue
Miami, Florida 33136

No. 30535 –
U.S.A. v. Lary Von Zamft

MANDATE STAYED TO:

October 16, 1971

Dear Sir:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ

of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21 (1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38LW 3502).

Enclosed is a copy of the opinion, judgment and order denying rehearing which are still required by the Supreme Court to be incorporated as an appendix to your petition.

Very truly yours,

Edward W. Wadsworth,
Clerk

By /s/ Claudette Staiger
Deputy Clerk

enc.
cc: Mr. Saul T. Von Zamft
Mr. Lary Von Zamft
Mr. Kenneth G. Oertel

APPENDIX E

2-B THE MIAMI HERALD Sat., July 18, 1970

Mrs. Copher With Daugther, Cynthia
. . . said money needed to bring son here

Draft Board Aide Tells of Bribe Offers

By COLIN DANGAARD
Herald Staff Writer

Former Dade draft board secretary Carolyn Copher, 26, said this week she was offered luxury trips to Europe and the Bahamas by wealthy Miami Beach residents trying to buy draft deferments for their sons. She said she accepted none of them — but did not report the offers either.

The one bribe she admitted accepting — $500 to arrange an occupational deferment for James Meni of Miami — got the blonde divorcee a three-year prison sentence last week.

She faced four other bribery charges as well, but prosecutors dropped them after Mrs. Copher pleaded guilty to the one involving Meni.

POOR, ill, eight months pregnant and relying on the help of friends to feed her two children, Mrs. Copher is now appealing the severity of the sentence, handed down by U.S. District Judge W. O. Mehrtens.

"I know what I did was wrong. And I'm terribly sorry about it and have learned my lesson.

"BUT almost every day, as executive secretary on Miami Beach, I could have accepted a lot more to recommend certain deferments.

"I was offered trips to Europe and the Bahamas, with all expenses paid."

"Many times it was indicated to me, quite clearly, that if I cooperated there would be substantial reward.

"With the heavy concentration of wealth in my particular area, the opportunity to do business was always there.

"I could have made a fortune, had I been really bad; it would have been a very simple matter to make deferments, and then take out the files when inspections were being made.

Mrs. Copher, an only child, was brought up in Arkansas where she received a degree in education, marrying in the meantime.

She worked for an Arkansas Selective Service board in 1965. When her marriage failed, she said the only thing in the world she wanted was to leave Arkansas.

There was a post open in Miami — executive secretary for Dade Draft Board 169 — so she p[illegible]ked, leaving her eight-year-old son in the care of her stepfather, but keeping her daughter Cynthia, 7, with her.

"I got lonely and began to miss my son very much. I knew he was being a burden on my stepfather, who has a heart condition.

"BUT I didn't have the money to bring him down," she said.

Opportunity telephoned in August last year. Prospective draftee Thomas M. Donahue 22, of 9020 SW 77th Ave.

was facing reclassification from 2S to 1A and immediate induction.

He figured he had nothing to lose, so he asked Mrs. Copher on the phone if it was possible to make "some kind of financial arrangement."

He reported later that she replied: "Well . . . yes."

The price tag attached to a 2A occupational deferment, he reported, was $1,500.

HE AGREED to pay this with $500 down and the rest later.

But then, he said, it began to bother him "that someone could buy his freedom from the military, that freedom was a commodity."

So he tipped off the FBI, who taped him with concealed recording equipment and followed him to a restaurant where he had agreed to meet Mrs. Copher.

IT WAS the start of an exhaustive investigation which resulted in a five-count indictment for the once gay, young secretary.

"Both the FBI and the State Attorney's Office indicated that if I pleaded guilty to one charge the others would be dropped," she said.

"THEY ALSO led me to believe that if I cooperated in this way, saving costly trials and preparation, then I would receive lenient treatment.

"I was expecting probation. I nearly died of shock when I heard three years of federal reformatory.

"If I'd thought for one moment this was going to happen I would never have pleaded guilty to anything."

Mrs. Copher entered her plea of guilty on April 14, after being told the possible penalty was 15 years or a $20,000 fine, or both.

When she appeared again before Judge Mehrtens, on July 2, an appeal for leniency was made on the grounds that she was pregnant.

JUDGE Mehrtens, however, said the pregnancy had not been mentioned on April 14, and added: " . . . this could be an out for any woman up for sentencing."

"But I became pregnant long before I was charged and appeared in court," Mrs. Copher said.

"Nobody made any promises, but all the way along the line everybody was indicating that if I cooperated there would be sympathy."

"Everytime people realize who I am, I find myself going some place else.

"I live from dollar to dollar."

She fears that if her appeal is not successful Cynthia will have to become a state ward.

"My stepfather couldn't handle another one. My son is already too much for him.

"It will break my heart to be separated from my children so long," she said, tears in her eyes.

"And I'm terrified at the thought of having my new baby in a jail."

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No. 71-543

In the Supreme Court of the United States

OCTOBER TERM, 1971

LARY VON ZAMPT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-543

LARY VON ZAMFT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

An indictment returned in the United States District Court for the Southern District of Florida charged petitioner in three counts with aiding and abetting Mrs. Carolyin Copher, executive secretary of a local selective service board, to accept bribes for Selective Service deferments, in violation of 18 U.S.C. 201. Petitioner was convicted on counts one and two and sentenced to concurrent terms of imprisonment for four years. He was acquitted by the jury on count four. The court of appeals affirmed *per curiam* without oral argument (Pet. App. B).

The evidence against petitioner was primarily provided by the draftees involved. James Meni (count 1)

449-223-71——1

testified that after he lost his occupational deferment he spoke with Mrs. Copher and she suggested that petitioner might help him (Tr. 42–56). Meni thereafter met with Copher and petitioner; at this meeting petitioner said that a deferment would cost $1,000, and Meni said he could pay only $500. Petitioner told Mrs. Copher he would take $200 and she could have $300. The next day Meni met Mrs. Copher and gave her a post-dated check for $500 and received his new classification deferring him from service (Tr. 56–64). Brotman (count 2) testified that he met with Mrs. Copher to discuss his classification. She said she knew someone who might help him and referred him to petitioner (Tr. 139–141). Brotman contacted petitioner who told him that he could obtain any deferment that Brotman wished for a fee of $1,000 (Tr. 142–145). At a subsequent meeting, Brotman paid petitioner $1,000 and received a draft card granting him a I–Y classification (Tr. 146).[1]

1. Petitioner contends that it was error to admit the testimony of the draftees as to conversations, negotiations and arrangements made with Mrs. Copher out of the presence of petitioner. This claim is insubstantial. Statements made during and in furtherance of the scheme by those engaged in an illegal joint enterprise—as were petitioner and Mrs.

[1] Rogge (count 4, upon which petitioner was acquitted) testified that he also spoke with Mrs. Copher at the draft board about his deferment; that she told him getting a deferment could depend on whom one knew; and that she put him in contact with an individual who looked very much like petitioner to whom he paid $2,000 in return for a deferment (Tr. 209–215).

Copher—are admissible against the others, whether or not a conspiracy is charged. *E.g., United States* v. *Rinaldi*, 393 F. 2d 97, 99 (C.A. 2), certiorari denied, 393 U.S. 913; *United States* v. *Spencer*, 415 F. 2d 1301, 1304 (C.A. 7); *United States* v. *Branker*, 418 F. 2d 378, 380 (C.A. 2); see *Dutton* v. *Evans*, 400 U.S. 74.[2]

2. At the trial, the government called Mrs. Copher as its first witness. Over defense objection, she testified that she had pleaded guilty to count one of the indictment (Tr. 32). The district court found this testimony admissible on the ground that the government had to prove the commission of the basic offense which petitioner was charged with aiding and abetting (Tr. 26–27). That the trial judge did not instruct that Mrs. Copher's admission of guilt could not be

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[2] Petitioner also contends that it was error for the court not to give his requested accomplice instruction limiting the testimony of Meni, Brotman, Rogge and Copher. Failure to give an accomplice instruction constitutes reversible error only in close evidentiary situations. See *Davis* v. *United States*, 411 F. 2d 1126, 1128 (C.A. 5); *Tillery* v. *United States*, 411 F. 2d 644, 647 (C.A. 5); Cf. *Caminetti* v. *United States*, 242 U.S. 470, 495. Here the evidence was not close on the counts upon which petitioner stands convicted. The draftees (Meni and Brotman) testified unequivocally that they met with petitioner concerning their draft status and that, without hesitation, he agreed to obtain deferments for them in exchange for a fee. The trial judge did instruct the jury that "[i]n weighing the testimony of each witness the jury should consider his relationship to the Government, or to the defendant; the witness's interest, if any, in the outcome of the case; his manner of testifying; his candor, fairness and intelligence; and the extent to which he has been corroborated or contradicted if at all, by other credible evidence." (Tr. 341–342).

considered against petitioner was harmless error in the circumstances of this case.[3] Mrs. Copher's admission of a plea of guilty went only to count one, and petitioner received concurrent sentences on that count and count two. Moreover, as noted, Mrs. Copher's testimony as to the plea came very early in the trial before the draftee witnesses testified. That the jury focussed on the testimony of the draftees and not that of Mrs. Copher is shown by its acquittal of petitioner on count four, where the draftee involved was not absolutely positive of his identification of petitioner as the man to whom he gave the money.

3. Petitioner's other contentions (the details of which are set forth at pages 11 and 12 of the petition) are also without merit. For example, petitioner contends that it was error for the trial court to refuse to require the production of the grand jury testimony of the witness Rogge. At the time of petitioner's trial,[4] absent a showing of a particularized need, the production of grand jury minutes was not required. *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395. Petitioner made no showing of a particularlized need (Tr. 237). Another contention is that the court erred in limiting the number of character witnesses called in petitioner's defense. It is clearly within the

[3] The government so argued in the court of appeals and while that court wrote no opinion, its affirmance justifies the conclusion that it agreed with the government's submission.

[4] In October 1970, subsequent to petitioner's trial in June 1970, 18 U.S.C. 3500 was amended to require the production of minutes of the grand jury testimony of a witness at the conclusion of his direct testimony.

court's discretion to limit the number of such witnesses. *Michelson* v. *United States*, 335 U.S. 469, 480; *United States* v. *Baysek*, 212 F. 2d 446, 447 C.A. 3), certiorari denied, 348 U.S. 836.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1971.

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IN THE

Supreme Court of the United States

Supreme Court, U.S.
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LARY VON ZAMFT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

UPON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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Washington, D. C. THIEL PRESS 202 393-0625

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Respondent.

UPON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

The manner in which Respondent has treated the questions presented warrants the filing of this Reply Brief by Petitioner in order that the important questions involved may be properly presented to this Court.

REPLY TO RESPONDENT'S STATEMENT OF THE FACTS

Petitioner argued, because he was only charged as an accomplice in the Indictment and because no conspiracy was charged, that the confession of guilt of Copher and her hearsay statements with prosecution witnesses Meni, Brotman and Rogge were inadmissible against Petitioner (pp. 15-17) citing *Bruton v. United States,* 391 U.S. 124, 88 S.Ct. 1620 (1968) and *Krulewitch v. United States,* 336 U. S. 440, 69 S.Ct. 716 (1949). Petitioner further pointed out that the Government and the courts below permitted the confession or plea of guilty of Copher and the hearsay testimony of prosecution witnesses Meni, Brotman and Rogge on the authority of *"Delli Paoli v. United States,* 352 U. S. 232" notwithstanding that this Court reversed *Paoli* in *Bruton.* The Solicitor General studiously avoids discussing *Paoli* and *Bruton.* The authorities cited by Respondent (Mem. p.3) do not overrule *Krulewitch* or *Bruton.* Respondent contends that the receipt of this hearsay evidence and the admission of guilt of Copher are harmless errors on the premise that the evidence of guilt "was not close" (Mem. p. 3, note 2) and Copher's plea of guilty "came very early in the trial" (Mem. p. 4). Respondent's argument that the evidence "was not close" is without merit and when the hearsay evidence is eliminated and the plea of guilty eliminated, there was no circumstantial evidence to convict Petitioner as an accomplice.

The evidence relied upon by Respondent is primarily hearsay. The hearsay evidence is Meni (count 1) "testified that after he lost his occupational deferment he spoke with Mrs. Copher and she suggested that Petitioner might help him." (Mem. p. 1-2). "Brotman (count 2) testified he met with Mrs. Copher to discuss his classification. She said she knew someone who might help him and referred him to Petitioner." (Mem. p. 2). "Rogge (count 4, upon which Petitioner was acquitted) testified he also spoke with Mrs. Copher at the Draft Board about his deferment; that she

told him giving a deferment could depend upon whom one knew; and that she put him in contact with an individual who looked very much like Petitioner * * * ." (Mem. p. 2).

Respondent concedes that this testimony and the plea of guilty under Count 1 of the Indictment was essential to prove the Government's case because "the Government had to prove the commission of the basic offense which Petitioner was charged with aiding and abetting." (Mem. p. 3).

Respondent further concedes that the trial judge erred in not instructing the jury that Mrs. Copher's admission of guilt could not be considered against Petitioner but seeks to avoid this essential element of proof by calling it "harmless error." (Mem. pp. 3-4).

REPLY TO RESPONDENT'S ARGUMENT

1, 2. As we pointed out in our Petition, the use of hearsay testimony to establish Petitioner was an aider or abettor and the use of a plea or confession of guilt to establish the guilt of Petitioner violates *Bruton* and the numerous decisions following *Bruton*, and this departure from the accepted course of judicial proceedings in criminal cases in the Fifth Circuit should be corrected under this Court's power of supervision in the public interest. (Petition, p. 23).

3. Respondent contends that the prosecutor was right in refusing, and the Court did not commit error in refusing, to require the production of the Grand Jury testimony of the witness Rogge after it was shown on cross-examination that he had testified to the facts to the Grand Jury which returned the Indictment. In support of this erroneous position, Respondent states "At the time of Petitioner's trial, absent a showing of a particularized need, the production of the Grand July minutes was not required. Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395. Petitioner made no showing of particularized need." (Mem. p. 4). Footnote 4 shows that the date of trial was in June of 1970.

We are surprised at this argument because prior to Petitioner's trial, this court decided *Dennis v. United States*, 384 U.S. 855, 86 S.Ct. 1840 (1966). *Dennis* reviewed Pittsburgh Plate Glass and clearly modified that decision in the area of particularized need. Under *Dennis* at the time Petitioner was tried in June, 1970, once it was shown that a witness had testified to facts involved before a Grand July, the defendant was entitled to examine the Grand Jury minutes and a refusal to permit such an examination by Petitioner, requires a reversal of a judgment of conviction. *Dennis* holds (pp. 869-871, 1849, 874-875, 1851-1852):

> "In general, however, the Court has confirmed the trial court's power under Rule 6(e) of the Federal Rules of Criminal Procedure to direct disclosure of grand jury testimony 'preliminarily to or in connection with a judicial proceeding.' In United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 234, 60 S.Ct. 811, 849, 84 L.Ed. 1129, the Court acknowledged that 'after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it.' In *Proctor & Gamble, supra,* the Court stated that 'problems concerning the use of the grand jury transcript at the trial to impeach a witness, to refresh his recollection, to test his credibility * * *' are 'cases of particularized need where the secrecy of the proceedings is lifted discretely and limitedly.' 365 U.S., at 683, 78 S.Ct., at 987. And in *Pittsburgh Plate Glass, supra,* where four members of the Court concluded that even on the special facts of that case the witness' grand jury testimony should have been supplied to the defense, the entire Court was agreed that upon a showing of 'particularized need' defense counsel might have access to relevant portions of the grand jury testimony of a trial witness, 380 U.S., at 400, 405, 79 S.Ct., at 1241, 1244. In a variety of circumstances, the lower federal courts, too, have made grand jury testimony available to defendants.
>
> These developments are entirely consonant with the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes

the proper administration of criminal justice. This realization is reflected in the enactment of the so-called Jencks Act, 18 U.S.C., Sec. 3500 (1964 ed.), responding to this Court's decision in Jencks v. United States, 353, U.S. 657, 77 S.Ct. 1007, 1 L.Ed. 2d 1103, which makes available to the defense a trial witness' pretrial statements insofar as they relate to his trial testimony. It is also reflected in the expanding body of materials, judicial and otherwise, favoring disclosure in criminal cases analogous to the civil practice.

* * * * *

In *Pittsburgh Plate Glass, supra,* the Court reserved decision on the question whether *in camera* inspection by the trial judge is an appropriate or satisfactory measure when there is a showing of a 'particularized need' for disclosure. 360 U.S., at 400, 79 S.Ct., at 1241. This procedure, followed by production to defense counsel in the event the trial judge finds inconsistencies, has been adopted in some of the Courts of Appeals. In the Second Circuit it is available as a matter of right. While this practice may be useful in enabling the trial court to rule on a defense motion for production to it of grand jury testimony—and we do not disapprove it for that purpose—it by no means disposes of the matter. Trial judges ought not to be burdened with the task or the responsibility of examining sometimes voluminous grand jury testimony in order to ascertain inconsistencies with trial testimony. In any event, 'it will be extremely difficult for even the most able and experienced trial judge under the pressures of conducting a trial to pick out all of the grand jury testimony that would be useful in impeaching a witness.' *Pittsburgh Plate Glass,* 360 U.S., at 410, 79 S.Ct., at 1246 (dissenting opinion). Nor is it realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for judges

> to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate. The trial judge's function in this respect is limited to deciding whether a case has been made for production, and to supervise the process: for example, to cause the elimination of extraneous matter and to rule upon applications by the Government for protective orders in unusual situations, such as those involving the Nation's security or clearcut dangers to individuals who are identified by the testimony produced. Cf. Fed. Rule Crim. Proc. 16(e), as amended in 1966; 18 U.S.C., Sec. 3500(c).
>
> Because petitioners were entitled to examine the grand jury minutes relating to trial testimony of the four government witnesses, and to do so while those witnesses were available for cross-examination, we reverse the judgment below and remand for a new trial."

Under *Dennis*, Petitioner is entitled to a new trial.

CONCLUSION

Petitioner submits and again prays that his Petition for Writ of Certiorari be granted and the decision below reversed.

Respectfully submitted,

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